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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, and THE NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

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BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Massachusetts in the case under appeal has not been reported but a copy of that opinion is annexed hereto as Appendix A. That opinion gives no reason for the District Court's decision other than the statement that this case is con-

trolled by the decision of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955 (1954), the opinion in which case is annexed hereto as Appendix B. The order of the Interstate Commerce Commission, which was the subject matter of the suit in the lower Court, is annexed hereto as Appendix C.

JURISDICTION

The final judgment of the District Court was entered on May 25, 1956. (Tr. 32). Notice of Appeal to this Court was filed on July 25, 1956. (Tr. 39). Probable jurisdiction was noted by this Court on November 19, 1956. (Tr. 43). Jurisdiction to review the judgment on direct appeal is conferred upon this Court by sections 1253 and 2101 (b) of the Judicial Code, 28 U.S.C. 1253 and 2101(b).

STATUTES AND REGULATIONS INVOLVED

The principal statutory provisions involved are the following:

> Section 9(b) — Administrative Procedure Act (5 U.S.C. 1008(b)). (This controversy concerns the third sentence, italicized herein for emphasis):
>
> (b) *Licenses*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless,

prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. *In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.*

Section 311(a)—Interstate Commerce Act (49 U.S.C. 911(a)):

To enable the provision of a service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need, the Commission may, in its discretion and without hearings, or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Other statutory and regulatory provisions involved are sections 210a(a), 210a(b), and 311(b) of the Interstate Commerce Act (49 U.S.C. 310a(a), 310a(b) and 911(b)); section 12 of the Administrative Procedure Act (5 U.S.C. 1011); sections 102, 103 and 1501 of the Second War Powers Act of 1942 (56 Stat. 177); section 1501 of Amendment to Second War Powers Act (60 Stat. 345); and sections 2.1-2.4 of the

Regulations of the Interstate Commerce Commission (49 C.F.R. Part 2, Sect. 2.1 to 2.4). These statutory and regulatory provisions appear in Appendix D hereto.

QUESTIONS PRESENTED

The following questions are presented by this Appeal:

First Question: Whether Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)) extended, or authorized or required the Commission to extend, beyond 180 days a temporary authority issued to Pan Atlantic Steamship Corporation under Section 311(a) of the Interstate Commerce Act (49 U.S.C. 911(a)) (Tr. 14) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by the Commission upon expiration of the 180 days of operation allowed by the temporary authority?

Second Question: Whether the District Court was in error in this case by following its decision in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, under the doctrine of *stare decisis,* in view of the fact that the Supreme Court of the United States noted probable jurisdiction in the appeal of that case, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 348 U.S. 855, 75 S. Ct. 205, 99 L. Ed. 696, and subsequently vacated said judgment and remanded the case to the District Court for dismissal of the pro-

ceedings in accordance with the stipulation of the parties as to mootness, 350 U.S. 906, 76 S. Ct. 190, 100 L. Ed. (adv. p. 125), and when two of the three judges in this case stated in their concurring opinion that were the matter *res integra,* they would have entered judgment for the defendant in this case?

STATEMENT OF THE CASE

The appellant, Pan-Atlantic Steamship Corporation, herein called Pan-Atlantic, is a Delaware Corporation operating as a common carrier by water of freight and passengers in interstate commerce between ports on the Atlantic and Gulf coasts of the United States, pursuant to a permanent certificate of public convenience and necessity issued by the Interstate Commerce Commission, herein called the Commission, and between ports on the Atlantic and Pacific Coasts of the United States, via the Panama Canal, pursuant to a temporary operating authority issued by the Commission. (Tr. 14). It is this temporary authority which is the subject matter of this case.

The appellees are corporations operating as common carriers by rail of freight and passengers in interstate commerce in the area of the United States east of the Mississippi River, and a segment of their operation involves the movement of transcontinental traffic through connections with western railroads. (Tr. 3).

On May 6, 1955, Pan-Atlantic filed an application with the Commission under section 309 of the Interstate Commerce Act (49 U.S.C. 909) for a permanent certificate of public convenience and necessity to transport freight and passengers as a common carrier

by water between certain ports on the east and west coasts of the United States via the Panama Canal. On that same date, in response to an urgent and immediate public need for such water carrier transportation, Pan-Atlantic filed a second application with the Commission, under the provisions of Section 311(a) of the Interstate Commerce Act, for immediate temporary authority to provide a substantial portion of the service proposed in its application for a permanent certificate. The Commission granted the application for temporary authority by its order dated May 18, 1955, and provided that such temporary authority would expire 180 days later on November 14, 1955. (Tr. 9).

On or about September 30, 1955, recognizing that the proceeding on the application for the permanent certificate would not be concluded prior to November 14, 1955, and to avoid cessation of the inter-coastal water carrier service which had been established pursuant to the temporary authority, Pan-Atlantic made a timely written request to the Commission, in accordance with applicable rules which had been published by the Commission (Appendix D) to implement the third sentence of section 9(b) of the Administrative Procedure Act, for findings permitting a continuation of its temporary authority until its application for permanent authority had been finally determined. (Tr. 11).

In response to the written request of Pan-Atlantic for findings permitting the extension of its temporary authority, the Commission issued an order dated October 28, 1955 (Appendix C) (Tr. 14) containing the following findings of fact: that the public need required the continuance of the service which Pan-

Atlantic had been providing under its temporary authority, that said activity of Pan-Atlantic was of a continuing nature, and that such service was contained within the scope of the application of Pan-Atlantic for a permanent certificate.

Based upon these findings, the Commission concluded that Pan-Atlantic was authorized, under the third sentence of section 9(b) of the Administrative Procedure Act, to continue the operations authorized by the temporary authority until the pending application for permanent authority had been finally determined.

A petition for reconsideration of the Commission's order of October 28, 1955, filed by the railroad appellees (Tr. 15), was denied by Commission January 9, 1956. (Tr. 18). The appellees filed an amended complaint on April 30, 1956, in the United States District Court to vacate, annul, and set aside the Commission's order of October 28, 1955. (Tr. 3).

The District Court held that this case was ruled in principle by the prior decision of that Court in *Stone's Express Inc.* v. *United States*, 122 F. Supp. 955 (1954) (Appendix B), and "that with the usual deference to precedent common in this Court", it should adhere to the conclusion reached in that case. In a concurring statement, two of the three judges constituting the three-judge court stated that if they were not, as they conceived it, bound by a prior ruling in the *Stone's Express Case*, they would conclude that "by virtue of section 9(b) of the Administrative Procedure Act, 60 Stat. 242, the Interstate Commerce Commission did not act *ultra vires* in entering its order of October 28, 1955." One of the three judges

concurring in this statement had participated in and approved the conclusion in the *Stone's Express Case*, which indicates a reversal of his opinion.

In the *Stone's Express Case*, supra, the District Court held that section 9(b) of the Administrative Procedure Act did not confer authority on the Commission to extend temporary licenses issued under section 210a(b) of the Interstate Commerce Act (49 U.S.C. 310a(b)) (Appendix D) beyond the 180 day limit specified in that section. An appeal from that decision was taken to this Court, which noted probable jurisdiction. (*Interstate Commerce Commission* v. *Stone's Express, Inc.*, 348 U.S. 885, 99 L. ed. 696, 75 S. Ct. 205). However, as a result of a final decision by the Commission of the pending permanent authority application of Stone's Express permitting it to acquire permanently the operation which it had been temporarily conducting, prior to a decision by this Court, the temporary authority expired, and the issues became moot. Upon the filing of a stipulation of the facts by the parties, the case was remanded to the District Court for dismissal as moot (350 U.S. 906, 100 L. ed. 125, 76 S. Ct. 190).

Apart from the *Stone's Express Case*, the issue presented by this appeal has never been decided by this Court or by any other court. The decision on this appeal will determine not only the legality of the Pan-Atlantic inter-coastal operation but also the legality of several hundred other motor carrier and water carrier operations being conducted under temporary licenses issued by the Commission for initial periods of 180 days and extended by it pursuant to findings made under section 9(b) of the Administrative Procedure Act during the pendency

of the applications of these carriers for permanent certificates.

SUMMARY OF ARGUMENT

FIRST QUESTION: The third sentence of section 9(b) of the Administrative Procedure Act prevents the expiration of a license of limited duration issued for an activity of a continuing nature, if the licensee has made a timely application for a new license to continue such activity, for such period as may be necessary to permit the licensing agency to complete its action on such application. The purpose of this legislation was to protect persons required to operate pursuant to licenses against a compulsory cessation of activities (and the irreparable injuries that would flow therefrom) resulting from the failure of the licensing agency to complete the processing of the timely-filed application for a new license before the existing license expired.

The temporary authority of Pan-Atlantic, issued under section 311(a) of the Interstate Commerce Act, is a license of limited duration applicable to an activity of a continuing nature, and, by its terms, it would have expired during the pendency of a proceeding before the Commission on the timely-filed application for a permanent certificate of public convenience and necessity covering such activity. The facts of this case therefore place it within the literal terms of section 9(b). Had the temporary authority of Pan-Atlantic not been extended by section 9(b), Pan-Atlantic would have been forced to suspend its inter-coastal operations during the remainder of the proceedings on its pending application for permanent authority to conduct such operations, at substantial

and irreparable injury to itself and despite the Commission's findings of a continuing public need for such service.

Section 311(a) of the Interstate Commerce Act is not in conflict with the third sentence of section 9(b) of the Administrative Procedure Act. Section 311(a) is a delegation of licensing authority to the Commission and authorizes issuance of temporary licenses subject to a time limit of 180 days. The third sentence of 9(b) need not be construed as a delegation of additional licensing authority to the Commission. Section 9(b) provides for the automatic extension of an existing license beyond its expiration date as a matter of law, provided certain jurisdictional facts exist. It is remedial legislation. The function of the Commission is to implement the operation of section 9(b) by determining whether such jurisdictional facts are present in a particular case, and if they are present, the Commission has no discretionary authority as to whether the license should be extended.

Even if section 9(b) of the Administrative Procedure Act is regarded as an extension of the licensing power of the Commission, and, therefore, must be reconciled with the period limitation in section 311(a) of the Interstate Commerce Act, the established canons of statutory construction, the legislative history of the statutes involved, and the long continued practice of the Commission with the knowledge and consent of Congress require that the third sentence of section 9(b) be construed as applicable to temporary licenses issued under section 311(a).

SECOND QUESTION: The District Court erred in applying the rule of *stare decisis* and entering judg-

ment for plaintiffs, rather than following their conclusion on the merits and entering judgment for the defendants. The rule of *stare decisis* has, as its object, the establishment of precision and certainty in the law; and it operates, in effect, as an estoppel applied to Court decisions. When the rights of individuals have been settled, on the basis of an announced judicial principle or statutory interpretation, public policy requires continued adherence to such judicial pronouncement. The ruling in *Stone's Express, Inc.* v. *United States, supra*, which was applied in this case under the doctrine of *stare decisis*, never adjudicated any rights between parties. That case was dismissed as moot, and the Interstate Commerce Commission neither before nor after that case has accepted or applied the interpretation announced therein. Thus, the *Stone's Express Case* established no precedent to which the doctrine of *stare decisis* would be applicable. In deciding this case, the District Court should have treated the question presented as a matter *res integra* and entered judgment for the defendants in accordance with their conclusions on the merits; as stated in the concurring opinion.

ARGUMENT

I. THE CHALLENGED ORDER OF THE INTERSTATE COMMERCE COMMISSION AND THE EXTENSION OF THE TEMPORARY AUTHORITY OF APPELLANT ARE AUTHORIZED BY SECTION 9(b) OF THE ADMINISTRATIVE PROCEDURE ACT.

The order under attack in the suit below was the order of the Interstate Commerce Commission, dated October 28, 1955, which, responsive to a written request by Pan-Atlantic, found that Pan-Atlantic had met the jurisdictional requirements of the quoted terms of section 9(b). As the result of such finding

Pan-Atlantic was authorized to continue intercoastal water carrier operations under a 180 day temporary authority, previously granted under section 311(a) of the Interstate Commerce Act, until such time as the Commission could complete its action upon a pending application of Pan-Atlantic for a certificate of public convenience and necessity authorizing it permanently to conduct the operation. The Commission's action and the continued operation rest upon the authority provided in the third sentence of section 9(b) of the Administrative Procedure Act, quoted above.

A. The Action Taken Was in Conformity With the Express Provisions of Section 9(b)

The language of the third sentence of section 9(b) provides:

> "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency".

This provision acts to extend the class of license therein defined if three conditions are met. These are: first, that there be a "licensee"; second, that the license authorize an "activity of a continuing nature"; and third, that the licensee has "in accordance with agency rules, made a timely and sufficient application for a renewal or new license" applicable to that activity. Those conditions were fulfilled in this case.

The Commission in its order of October 28, 1955 (Appendix C) made the necessary jurisdictional

findings for application of section 9(b) to the Pan-Atlantic temporary license, as follows:

> "That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub. No. 43) seeks a certificate of public convenience and necessity . . ."

1. Pan-Atlantic was a licensee

Pan-Atlantic was a licensee, since it was the holder of a temporary authority issued by the Commission on May 18, 1955, authorizing it to engage in the business of common carrier by water between Atlantic and Pacific Coast ports for a period of 180 days. Such an authority is a "license" within the meaning of the Administrative Procedure Act. Section 2(e) of that Act (5 U.S.C. 1001(e)) defines the word as follows:

> "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

The third sentence of section 9(b) deals with licenses issued for a specified term, as distinguished from those of indefinite duration, since its subject matter is licenses requiring renewal or replacement. The legislative history of section 9(b) shows that the third sentence of the section was to have application to temporary licenses of the type presented in this proceeding. The Senate Committee on the Judiciary and the House Committee on the Judiciary, in their reports on S.7 (Administrative Procedure Act), in commenting on section 9(b) drew a distinction between

the application of the second and third sentences of the section; the distinction made establishes that the third sentence was to have application to temporary licenses. In commenting on the second sentence, which establishes conditions for agency revocation of licenses, they said:

> "However, this limitation does not apply to temporary permits or temporary licenses." (Sen. Doc. No. 248, 79th Congress, 2d Session, pages 212 and 275).

The report of the Attorney General to the Senate Judiciary Committee, in response to its request for his comments on S.7, similarly states in regard to section 9(b):

> "The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses." (Op. cit., page 229).

While it is clear that the third sentence of section 9(b) relates to temporary licenses of the type here involved, an issue is presented whether Pan-Atlantic was a "licensee" within the meaning of this part of the statute at such time as to make it applicable.

2. Pan-Atlantic was a licensee at the time necessary to make Section 9(b) applicable

Pan-Atlantic filed its temporary authority application and its corresponding application for permanent authority simultaneously, on or about May 8, 1955. The temporary authority was granted on May 18, 1955. The permanent authority application, therefore, was on file prior to the creation of the temporary license on May 18, 1955. The procedure was "in accordance

with agency rules." Section 2.2(a) of the Commission's rules (49 C.F.R. 2.2(a); see Appendix D) provides merely that the application for permanent authority must have been filed not later than 60 days after the grant of the temporary authority.

In the *Stone's Express Case*, it was held, in similar circumstances, that section 9(b) was inapplicable, among other reasons, because, as here, the carrier concerned was not a temporary licensee at the time that the application for permanent authority was *filed*, thus suggesting that the third sentence of section 9(b) is applicable, if at all, only when the creation of the temporary license precedes the filing of the application for "a renewal or a new license."

Appellants urge this Court to reject the interpretation of the Court in the *Stone's Express Case* (which the lower Court in this case applied) as one not required by consideration of the literal meaning of the words employed in the statute, as one which would controvert rather than assist in accomplishing the legislative objective to which the provision relates, as one which would create artificial and unreasonable distinctions in the application of the provision to persons similarly situated, and as one inconsistent with settled administrative construction and the legislative history of the provision.

The pertinent language in the third sentence of section 9(b) provides for renewal of or issuance of new licenses "in any case in which the licensee has . . . made timely and sufficient application . . . ." The District Court's interpretation would require a reading incorporating a parenthetical addition, in effect as follows: "in any case in which the licensee has (at the

time he was a licensee) . . . made timely and sufficient application . . . ." The third sentence of section 9(b), however, speaks as of the time of expiration of the temporary license, not as of the time when it was created. Although it establishes some conditions governing its application, it does not expressly establish a condition making it necessary for the temporary license to have preceded the request for a permanent one. The controlling criterion is that the activity must be one of a continuing nature. The activity may be of a continuing nature whether or not the temporary authority was established first. The construction adopted by the District Court creates a repugnance of meaning within the terms of the provision as well as controverting its purpose.

The purpose of the third sentence of section 9(b) is to protect licensees against injury from dilatory agency action, by providing for automatic extension of a license in any case involving a continuing activity in which the person engaged in the activity has made a timely request for renewal and the issuing agency, because of inadequate time, fails to act prior to the expiration of the existing license. (See Part II B below). The District Court's interpretation, in light of this purpose, contradicts that objective. By filing its permanent authority application concurrently with its temporary authority application, Pan-Atlantic here enabled the Commission to employ the full term of the 180 day temporary license, together with the time (10 days) which elapsed between the time of their filing and the date of the grant of the temporary license, to complete its action on the permanent authority application. Had it followed the procedure suggested by the opinion of the District Court in the

Stone's Express Case, and withheld filing its permanent authority application until after the grant of the temporary license, the effect would have been to have shortened the time during which the agency might act on the permanent authority application. Carrying this example to the extreme limits implicit in the lower court's interpretation, a temporary licensee might wait indefinitely (within the limits of agency rules) following its acquisition of a temporary license before filing for a renewal or new license, thus depriving the agency of adequate opportunity to rule on such application before the expiration of the temporary license. Such a result is clearly contrary to the result sought to be accomplished through this provision.

Since the third sentence of section 9(b) acts upon the situation as it exists at the time when the temporary license would expire, one who "has . . . made" an application for renewal or a new license is one who has made such an application prior to the date upon which his temporary license would otherwise expire. Such an interpretation is in accord with the literal meaning of the words employed and with the purpose which this remedial legislation sought to accomplish.

The interpretation of the District Court, moreover, would create an artificial and unreasonable distinction between persons in identical positions insofar as the purpose of section 9(b) is concerned. The evil that section 9(b) is intended to cure is the non-compensable injury that would follow a forced suspension of operations by a temporary licensee on the expiration date of its temporary license and while its application for permanent authority is pending.

That evil arises without regard to whether the application for permanent authority was filed before or after the temporary license was issued; but under the doctrine of the *Stone's Express Case*, a licensee who filed his application for permanent authority after receiving his temporary license would be protected by section 9(b), but the licensee who filed his application for permanent authority before receiving his temporary license would not be so protected, notwithstanding the fact that upon the expiration date of the two temporary licenses, both licensees would be in identical positions.

The Interstate Commerce Commission has long applied the construction, here advanced by appellant, that the third sentence of section 9(b) applies to temporary licensees who have permanent applications pending at the time of the *expiration* rather than at the time of the *inception* of their temporary licenses. Its "agency rules" (Appendix D) made under section 9(b) do not establish the distinction which the lower court's interpretation would create. It has extended many hundreds of temporary authorities under circumstances similar to those in the *Stone's Express Case*. Its agency rules in situations arising under section 210a(b), which authorize the grant of temporary authority to operate or control a motor carrier operation pending disposition of an application for permanent acquisition filed pursuant to section 5(2) of the Act, *requires simultaneous filing* of the application under section 5(2) with that filed under section 210a(b).*

* I.C.C. Form B.M.C. 46 (revised), applicable to applications for approval of temporary authority to control a motor carrier under section 210a(b) of the Act, contains the following printed

The legislative history of the provision in question does not support the interpretation adopted by the lower court. The comment of the Attorney General, supra, ". . . temporary licenses which may be issued pending the determination of applications for licenses", indicates his understanding that temporary licenses might be issued *after* the filing of the permanent authority application, within the purview of the third sentence of section 9(b). Although a similar provision, which specifically requires the antecedent grant of a temporary license, is present in the licensing procedure act of the State of Ohio (see text in *Stone's Express Case* decision, Appendix B herein), and was considered by Congress in drafting section 9(b) (a fact relied upon by the lower court), Congress did not adopt the language of that act, but formulated its own expression in the light of the purpose and circumstances reviewed above and omitted that specific condition.

For the foregoing reasons we submit that the word "licensee" as used in section 9(b) should be construed as of the date of the expiration of the temporary license, when section 9(b) becomes applicable; and, as heretofore demonstrated, Pan-Atlantic was a licensee under such interpretation.

3. Pan-Atlantic's temporary license authorized an activity of a continuing nature

Although the license granted to Pan-Atlantic by the Commission on May 18, 1955, pursuant to section 311(a) was of limited duration, namely 180 days, the

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instruction: "No consideration can be accorded an application for temporary authority under section 210a(b) unless a corresponding application under section 5 has been filed." See also section 180.6 of the I.C.C. Motor Carrier Regulations (49 C.F.R. 180.6).

activity which it authorized was of a continuing nature. The license was granted in response to representations by the public of a need for a continuing inter-coastal water-carrier service in the transportation of freight and passengers. The fact that Pan-Atlantic had filed its permanent authority application simultaneously with the temporary authority application evidenced its intention to provide a continuing service. That service, initiated shortly after the grant of the temporary license, has been continuous. The Commission, in the challenged order, found the activity to be of a continuing nature. The finding was not challenged in the proceeding below.

4. Pan-Atlantic made timely and sufficient application for renewal of its license

Pan-Atlantic's request for renewal of its temporary authority pursuant to the third sentence of section 9(b) was filed in accordance with the rules which the Commission has provided to govern such proceedings. (49 C.F.R. 2.1-2.4, Appendix D, herein). The Commission found in its challenged order that this request was timely and sufficient. The finding was not challenged in the proceeding below.

II. THE EXTENSION OF PAN-ATLANTIC'S TEMPORARY AUTHORITY PURSUANT TO SECTION 9(b) OF THE ADMINISTRATIVE PROCEDURE ACT IS NOT PROHIBITED BY THE TERMS OF SECTION 311(a) OF THE INTERSTATE COMMERCE ACT.

The temporary license granted Pan-Atlantic on May 18, 1955 was issued by the Commission pursuant to authority granted it in section 311(a) of the Interstate Commerce Act (49 U.S.C. 911), which provides that the Commission may grant temporary authorities "for which there is an urgent need", and an absence

of "carrier service capable of meeting such need". The statutory authority is conditioned as follows:

> "Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, . . . "

Accordingly, the temporary authority granted to Pan-Atlantic was conditioned to expire at the end of a period of 180 days from its date of issue.

Prior to the expiration of that temporary authority, as shown above, actions were completed by Pan-Atlantic and the Commission which established that the situation was one within the meaning of the third sentence of section 9(b), thereby invoking the automatic extension of that temporary authority pending determination of the permanent authority application. The challenged Commission order gave evidence of that fact. Thus, there is created an apparent inconsistency between the express period limitation in section 311(a) and the automatic extension provision of section 9(b). That conflict, however, is more apparent than real, as shown by consideration of the seemingly conflicting positions of those sections in light of the language employed and the intention expressed by Congress.

A. The Legislative Histories of Sections 311(a) and 9(b) Establish a Basis for Harmonious Construction

Section 311(a) applicable to water carriers, was enacted in 1940, and is similar to section 210a(a), (49 U.S.C. 310a(a)), applicable to motor carriers. The House Committee on Interstate and Foreign Commerce in its Report 1217, 76th Congress, 1st Session, described section 311 (49 U.S.C. 903) as follows:

"This section permits the Commission to authorize temporary operations by water carriers to meet immediate and urgent needs, and in cases where delays occur in connection with the determination of applications for consolidations and mergers. It is comparable to section 210a of Part II."

Section 210a(a) did not appear in the Motor Carrier Act of 1935, now Part II of the Act. The Commission soon recognized the need for authority to issue temporary licenses and brought this matter to the attention of Congress in 1938 in a letter appearing in Senate Document 154, 75th Congress, 3rd Session, which stated in part:

"As the Act now stands, it is necessary, before new operations of a motor carrier can be undertaken, to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The Act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.

"Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues here presented. The Act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants".

Section 210a(a) was added as a result of this request in 1938.

A three-judge United States District Court in *Kansas City and Leavenworth Transp. Co. v. United States*, 51 F. Supp. 916, in construing the intent of section 210a(a), made the following pertinent comments, at page 920, which apply with equal validity to section 311(a):

> "Second, we think that section 210a(a) must be considered in the light of section 207(a). Under the latter section applications for certificates of authority are based on "present" and "future" public convenience and necessity. There is no requirement of proof of permanent public convenience and necessity. Considering the two sections and what each was designed to accomplish, we think Congress, in its experience, saw that public convenience and necessity, would, at times, become so urgent as to require transportation facilities without waiting for hearing and decision under section 207(a). Accordingly, it enacted section 210(a) which provides for the issuance of a certificate for immediate need. *Such immediate necessity is designed to cover that period which may elapse before the Commission issues a certificate under section 207(a).*"

In 1938, when section 210a(a) was enacted, and even as late as 1940, when section 311(a) became law, it was believed that 180 days was an adequate period of time within which to permit the Commission to complete action upon the permanent authority applications corresponding to the temporary authorities issued pursuant to those sections. Such has not proved to be the case, many such applications actually requiring 12 months or more to complete. The advent

of the war period tremendously increased the administrative burden, as applications were filed to meet rapidly changing conditions, necessitating relief from the 180 day limitation in these sections. Such relief was obtained initially as a temporary measure by section 103 of the Second War Powers Act of 1942 (56 Stat. 177) (Appendix D), which amended section 311(a) of the Interstate Commerce Act in the following words:

> "Section 103. Subsection (a) of section 311 of said Act, as amended, (U.S.C. 1940 Ed., Title 49, section 911(a)), is hereby amended by striking out the words 'but not for more than an aggregate of one hundred and eighty days.'"

The amendment also provided, in section 1501, for the reinsertion of the 180-day limitation upon expiration of the Second War Powers Act. Similar treatment was accorded section 210a(a).

Even though the 180-day limitation provision later was reinserted in sections 210a(a) and 311(a), it did not become applicable to temporary authorities issued for continuing activities, under the circumstances presented in this case. Prior to the expiration of the Second War Powers Act, Congress had undertaken the task of renovating the administrative processes of the Government, which resulted in the enactment of the Administrative Procedure Act, effective September 11, 1946. As enacted, it contained section 9(b) which, as shown, provided for the automatic extension of temporary authorities governing activities of a continuing nature to protect the holders thereof from forced cessation of operations resulting from agency delays in deciding applications for renewals or new licenses.

When section 9(b) became law, the 180-day limitations in sections 311(a) and 210a(a) were still absent. (The words had been physically deleted from authorized prints of the statute.) As a consequence, the provisions of section 9(b), for automatic extension of temporary licenses for activities of a continuing nature, became effective before the present 180-day limitation was restored to sections 311(a) and 210a(a). That limitation was reinserted in those sections on March 31, 1947, the date of expiration of the Second War Powers Act of 1942. That reinsertion occurred, not by Congressional action taken at that time, but as the result of section 1501 of that Act, which provided that all legislative changes made by that Act would automatically be terminated, and the status quo ante restored, upon expiration of that Act.*

B. Section 9(b) Extends Temporary Licenses by Operation of Law Rather Than Through Granting Additional Licensing Authority to Administrative Agencies; There Is No Actual Contradiction in Terms Between Sections 9(b) and 311(a)

The Administrative Procedure Act was adopted as remedial legislation to accomplish reforms in the administrative processes of Government. The third sentence of section 9(b) had a specific purpose within the scope of the broad objectives of that legislation. The House Judiciary Committee, in reporting out this bill, stated: "The bill is an outline of minimum essential rights and procedures", and this Court, in

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* Section 1501 of the Second War Powers Act of 1942 originally provided for restoration of legislation to the original form (including re-insertion of the 180-day limitation, although not specifically mentioned) at its expiration date of December 31, 1944. This date was successively extended to December 31, 1945, June 30, 1946, and March 31, 1947.

Wong Yang Sung v. *McGrath*, 339 U.S. 33, 94 L. Ed. 616, at 624, stated:

> "The Act thus represents a long period of study and strife; it settled long-continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities, and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils aimed at appear."

Congressman Walter, the member of the House Committee on the Judiciary who had charge of the bill on the floor of the House, in explaining the several provisions to the House, stated as follows with respect to section 9(b):

> "Section 9(b) deals with licensing. It requires agencies to determine promptly all applications for licenses, prohibits them from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of obvious willfulness or emergency, and in businesses of a continuing nature precludes any license from expiring until timely applications for new licenses or renewals have been determined.
>
> "These special provisions are necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies. The burden is upon private parties to apply for licenses or renewals. If agencies are dilatory in either kind of application, parties are subjected to irreparable injuries unless safeguards

are provided. The purpose of this section is to remove the threat of disastrous arbitrary and irremediable administrative action." (Senate Document No. 248, 79th Congress, 2d Session. Page 368).

The Senate Judiciary Committee print of S.7 dated June, 1945, contained explanations of each of the sections of the bill. The explanation of section 9(b) reads, in part, as follows:

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. . . . The third sentence automatically extends a license in any case in which the licensee has made a timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1, amending secs. 154-167 of the General Code; Amended substitute Senate Bill No. 36)." (Senate Document No. 248, 79th Congress, 2d Session, Page 35.)

The language of the third sentence of section 9(b) is not in actual conflict with the 180-day limitation of section 311(a), unless the pertinent portion of section 9(b) be construed as granting authority *to the Commission* to extend temporary licenses, rather than as a provision which extends temporary licenses by operation of law. If the first construction is adopted, there is an apparent inconsistency in the two provisions in that one permits issuance of temporary licenses for periods not to exceed 180 days and the other permits continuation of those licenses for longer periods. If the second construction is adopted, there is no inconsistency; although the authority granted to the

Commission remains subject to the 180-day limitation, Congress has provided for an automatic extension of certain of those licenses through section 9(b).

The language employed in section 9(b) supports adoption of the second construction. It provides that, upon establishment of the specified jurisdictional requirements, "*no license* with reference to any activity of a continuing nature *shall expire* . . .". It does not state that "no license shall be permitted to expire". It acts directly on the license itself.

In the proceeding below, appellants urged adoption of this second construction as decisive of this controlling issue. This argument appears to have been accepted by at least two of the three judges comprising the court below, who stated in their concurring opinion that, had this been a matter of first impression, they would have held that the Commission had not acted ultra vires.

In the *Stone's Express Case,* supra, this basis for harmoniously construing section 9(b) and the pertinent authority provision of the Interstate Commerce Act (there, section 210a(b)) was not urged upon the Court and was not considered by it. In that case it was argued that section 9(b) constituted an additional grant of licensing authority to the Commission. As a consequence, the court there viewed the statutes as being contradictory in terms; it found that section 9(b) was subsequent legislation* containing no

* The Administrative Procedure Act was subsequent legislation to section 210a(b), involved in the *Stone's Express Case*, and to section 311(b), which were not amended by the Second War Powers Act of 1942. As shown above, however, section 311(a), here involved and section 210a(a) had no 180-day limitations at the time of the enactment of the Administrative Procedure Act. Since the

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express repeal provision related specifically to the 180 day limitations in section 210a(b) of the Interstate Commerce Act; it found that there could be no implied repeal of the 180-day limitations; and it concluded, therefore, that the *Commission* had not been authorized to extend the 180-day license there involved beyond the 180-day initial period.

The function assigned to the Commission by section 9(b) does not constitute licensing. The fact that section 9(b) contemplates that the agencies involved shall prescribe rules governing the filing of timely and sufficient applications for renewal or new licenses, the fact that the Commission has prescribed such rules, and the further fact that the Commission issues its findings in the form of an order having the appearance of a grant *by the Commission* of an extension of the temporary license, cannot and do not change the essential legal character of the action accomplished. That action is an extension of the temporary license *by operation of law* (section 9(b)), and *not by operation of discretionary authority vested in the Commission*. The foregoing procedures of the Commission are in accordance both with the terms of section 9(b) and section 12 of the Administrative Procedure Act (5 U.S.C. 1011), which provides:

> "Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise."

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limitations were merely suspended, however, rather than repealed, this distinction is significant principally as an aid to determination of the legislative purpose. It also suggests that implied repeal of the section 311(a) limitation by section 9(b) is not involved, even assuming that they are in conflict.

To hold that the third sentence of section 9(b) provides only for permissive agency action in renewing temporary licenses, rather than extension through operation of the law, would defeat the very purpose of that provision. It was designed to overcome dilatory agency action. Licensees engaged in continuing activities were extended statutory protection against the irreparable harm of forced cessation of operations, resulting from delays in administrative processes and from arbitrary and unreasonable agency actions. Necessarily it was provided that the protection to the temporary licensees would come from the statute rather than from the agencies.

C. Assuming, Arguendo, That Section 9(b) Grants Additional Licensing Authority to Administrative Agencies Rather Than Extending Licenses by Operation of Law, the Canons of Statutory Construction Permit a Harmonious Reconciliation of Sections 311(a) and 9(b)

In construing the apparently conflicting portions of sections 9(b) of the Administrative Procedure Act and 311(a) of the Interstate Commerce Act, the question is presented whether, in light of the Congressional purpose so clearly expressed, the additional licensing power granted to the Commission by the third sentence of section 9(b), assuming such grant to be the effect of that provision, is to be subordinated to the "status quo ante" provision in the Second War Powers Act of 1942, by which the 180-day limitation was reinserted in section 311(a).

The usual aids to statutory construction support the view that the paramount legislative purpose is expressed in section 9(b) and that the "status quo ante" reinsertion of the 180-day limitation in section 311(a) should not be construed as a change in that purpose

nor a repeal by implication of the third sentence of section 9(b).

First, in light of the history set forth above, it is clear that section 9(b) represents specific legislation, whereas the automatic reinsertion of the 180-day limitation was the result of general legislation. The reinsertion was accomplished by section 1501 of the Second War Powers Act of 1942, which provided that at some distant time in the future the multitude of different statutory subject matters changed by that emergency legislation would be automatically restored to the status quo ante.

Second, section 9(b) represents the latest expression of legislative purpose. The reinsertion of the 180-day limitation on March 31, 1947, occurred as the result of legislation enacted five years earlier. The pertinent language of section 9(b) became law in 1946, and in light of conditions in existence at that time.

Third, the reinsertion of the 180-day limitation in section 311(a) should be viewed as subsequent legislation and, as such, is ineffective to accomplish implied repeal of the third sentence of section 9(b). In 1946 when section 9(b) became law, there was no 180-day limitation in section 311(a). (See II A above). The provisions of section 1501 of the Second War Powers Act of 1942 became operative, and accomplished the statutory changes provided therein, on April 1, 1947, with the expiration of that Act. As such, reinsertion of the 180-day limitation was legislation subsequent to the effective date of the Administrative Procedure Act—September 11, 1946. (It was not, however, the result of any contemporary change in Congressional

policy or purpose). Section 12 of the Administrative Procedure Act (5 U.S.C. 1011) provides:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Section 1501, enacted in 1942, obviously could make no express mention of the Administrative Procedure Act and the reinsertion of the 180-day limitation in section 311(a), made effective by section 1501 on April 1, 1947, cannot therefore supersede or modify section 9(b) of the Administrative Procedure Act.

Fourth, construing section 9(b) as modifying section 311(a) is logical in that it does not render either section inapplicable to proceedings arising under the Interstate Commerce Act, but provides an appropriate function, consistent with their purposes, for each. Temporary authorities issued under section 311(a) may authorize either continuing or non-continuing activities; applications for such authorities may be accompanied by permanent authority applications or may not be. Pan-Atlantic's operation is an example of an activity or operation of a continuing nature accompanied by such an application. Activities of a non-continuing nature (and many applications under section 311(a) are granted to authorize them), at the minimum, consist of one trip, as, for example, the movement of one vessel-load of lumber from Coos Bay, Oregon, to Providence, R. I., or the transportation of passengers in excursion service for a particular trip or for a particular vacation season. The time limitation in section 311(a) initially applies to all authorities issued pursuant to its terms. Section

9(b) takes effect only in those instances involving continuing activities, and only when appropriate and timely applications for renewals or new licenses are filed. The 180-day limitation in section 311(a) continues to be fully effective in all other instances. The construction of these two sections here urged by appellants thus affords to each an appropriate legislative purpose.

The lower court's opinion in the *Stone's Express Case* would render the third sentence of section 9(b) completely nugatory, not only with respect to section 311(a) of the Interstate Commerce Act, but also with respect to sections 310a(b), 210a and 210a(b). These four sections represent all of the temporary licensing powers of the Commission, consequently, the rule of the *Stone's Express Case* would make the Interstate Commerce Act an implied exception to the provision contained in the third paragraph of section 9(b).

Congress did not intend to make a special exception of the Interstate Commerce Act. The Administrative Procedure Act applies to every agency of the Government of the United States, other than those specifically exempted by section 2 of that Act (5 U.S.C. Sec. 1001), or by other specific subsequent legislation. The Interstate Commerce Commission is not listed among the exempted agencies, and the Courts have consistently treated the Administrative Procedure Act as being applicable to the Interstate Commerce Act. (See annotation: "Administrative Procedure Act" 97 L. ed. 900-905). Exemption from any part of the Administrative Procedure Act must be express. *Marcello* v. *Bonds*, 349 U.S. 302, 99 L. ed. 1107. There are no express provisions in either the Administrative Procedure Act or the Interstate Commerce Act which

state that the third section of section 9(b) of the Administrative Procedure Act is not intended to be applicable to section 311(a) of the Interstate Commerce Act.

In the report of the Senate Committee on the Judiciary accompanying S.7, the following remarks applicable to the scope of the Administrative Procedure ~~Act~~ in general and its applicability to the Interstate Commerce Commission in particular were made:

> "In undertaking the foregoing very lengthy process of consideration, the committee has attempted to make sure that no operation of the Government is unduly restricted. *The Committee has also taken the position that the bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or change in present administrative operations.* The Committee is convinced, however, that no administrative function is improperly affected by the present bill.
>
> "The Principal Problems. — The principal problems of the committee have been: First, to distinguish between different types of administrative operations. Second, to frame general requirements applicable to each such type of operation. Third, to set forth those requirements in clear and simple terms. Fourth, to make sure that the bill is complete enough to cover the whole field.
>
> "The Committee feels that it has avoided the mistake of attempting to over simplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. *In so doing, it has been the unaviating policy to deal with types of functions as such and in no case with*

administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions. Manifestly, it would be folly to assume to distinguish between "good" agencies and the others, and no such distinction is made in the bill. *The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill.*

"The Committee feels that administrative operations should be treated as a whole lest the neglect of some link defeat the purpose of the bill." (Emphasis added) (Senate Document No. 248, 79th Congress, 2d Session, pages 191-192).

From the foregoing statements it is apparent that Congress intended to have section 9(b) apply to all types of temporary licenses, unless an express provision in the Administrative Procedure Act to the contrary appeared. The Interstate Commerce Commission is, of course, one of the major licensing agencies. The Interstate Commerce Act, moreover, is one of the few Acts which uses the phrase "temporary" in connection with the granting of licenses. Yet, the reports of both Committees used the phrase "temporary permits or temporary licenses" in their references to section 9(b). (Senate Document No. 248, 79th Congress, 2d Session, Pages 212 and 275).

A perfectly reasonable construction may be placed upon both section 9(b) and section 311(a), which will permit both sections to exist harmoniously and effectively, thereby complying with the well established principle that "the purpose of statutory construction is to harmonize the law and save apparently conflicting

statutes from ineffectiveness." *Musselman Hub Brake Co.* v. *Commissioner*, 139 F. Supp. 2d 65. The proper construction is that the 180-day limitation in section 311(a) be given full force and effect, except that section 9(b) be treated as a proviso to section 311(a), removing its application under the circumstances specified in section 9(b).

D. The Settled Construction by the Commission of the Statutes Involved Is Entitled to Great Weight

The Commission has administered the statutes involved, consistent with the construction applied to them by appellants herein, since the expiration of the Second War Powers Act in 1947. It has promulgated rules in accordance with the rule-making provisions of the Administrative Procedure Act for the extension of licenses under the third sentence of section 9(b) of that Act, as that Act contemplated. Those rules are necessary to provide a procedure for determining the applicability of section 9(b) to particular situations in light of the jurisdictional findings required to be made. Those rules also provide a method by which the Commission's order, essentially a declaratory order, may establish whether a particular license is extended or renewed pursuant to section 9(b). Congress clearly contemplated that the agencies directly affected would take the necessary actions in the first instance to implement the provisions of that Act. Assuming that section 9(b) may be construed to be a substantive extension of the Commission's licensing powers, then the Commission's rules are clearly essential to implement its licensing powers. Thus, under either construction of the effect of section 9(b), the Commission is obligated, in the first instance, to construe the meaning and effect of section 9(b).

On September 16, 1947, the Commission issued a public notice, couched in the language of section 9(b) of the Administrative Procedure Act, in which the Commission stated that temporary authorities issued by the Commission would continue in effect until the final determination of corresponding permanent certificate applications. Subsequently on July 6, 1948, the Commission issued formal rules spelling out in detail the manner in which the words "timely and sufficient" and "activity of a continuing nature" would be interpreted for the purposes of section 9(b) as applied to section 311(a) (Appendix D). The Commission has consistently applied such rules from their inception in 1947 until the present date.

Each year commencing with 1947 the Commission, in its Annual Report to Congress, set forth in detail the number of temporary authorities extended pursuant to section 9(b). Hundreds of motor carriers and water carriers, in reliance upon this long settled construction of these statutes, have established at considerable expense, and are operating, common carrier service under grants of temporary authority, pending the final determination of their applications for permanent authority.

The Courts have consistently held that both contemporaneous and long settled construction of an Act by the Agency responsible for its administration should receive much consideration. In *United States* v. *Alabama Railroad Company*, 142 U.S. 615, 35 L. Ed. 1134 (1892), at page 621, this Court said:

> "We think the contemporaneous construction thus given by the Executive Department of the Government, and continued for nine years through six different administrations of that department

—a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this Court, in case of ambiguity, the Judicial Department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties that have contracted with the Government upon faith of such construction may be prejudiced."

Likewise, in *Fawcus Machine Company v. United States*, 282 U.S. 375, 75 L. Ed. 397 (1931), at page 377, this Court said, with respect to an interpretative regulation of the type here in question:

"They constitute contemporaneous construction by those charged with the administration of the Act, are for that reason entitled to respectful consideration, and will not be over-ruled except for weighty reasons."

See also: *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 84 L. Ed. 1345 (1940); *Boutell v. Walling*, 148 F. 2d 329 (6th C.C.A., 1945); *United States v. Kocmond*, 200 F. 2nd 370 (7th C.C.A., 1952).

Congress itself appears to have accepted for its own use this construction of section 9(b). In Senate Document No. 72, 82d Congress, 1st Session, which is a print of the Interstate Commerce Act, pursuant to Senate Resolution No. 205, for the use of the Senate Committee on Interstate and Foreign Commerce and for the use of the Senate Document Room, Section

311(a) thereof carries a specific reference note reading: "See also the last sentence of section 9(b) of the Administrative Procedure Act, 5 U.S.C., Section 1008(b), *infra*." When the construction applied by an administrative agency to a statute has been consistently followed for a number of years with the knowledge and acquiescence of Congress, it is entitled to even greater weight. See *Norwegian Nitrogen Company* v. *United States*, 288 U.S. 294, 77 L. ed. 796 (1933).

We submit that, even if section 9(b) is regarded as an extension of the licensing authority of the Commission, and therefore must be reconciled with the specific limitation on that authority in section 311(a), the canons of statutory construction, the clear intent of Congress, and the long established practice of the administrative agency with the knowledge and consent of Congress, all require that section 9(b) of the Administrative Procedure Act be held applicable to temporary licenses issued under section 311(a) of the Interstate Commerce Act.

III. THE DISTRICT COURT ERRED IN APPLYING THE RULE OF STARE DECISIS IN RELIANCE ON THE STONE'S EXPRESS CASE.

The decision of the District Court in this case stated (Appendix A) (Tr. 30-31):

> "This case is ruled in principle by the decision of this court in *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955 (1954). Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U.S. 906 (1955). Though that case involved the 180 day limitation in section 210a(b) of the Interstate

> Commerce Act (49 U.S.C. Sec. 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this court, we should adhere to the conclusion reached in *Stone's Express Inc.* v. *United States,* supra."

In a concurring opinion, Judge Wyzanski stated:

> "I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra,* and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States,* D. Mass. 122 F. Supp. 955 (1954), I should conclude that, by virtue of sec. 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I.C.C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view".

Thus, two of the three judges have expressly stated that, in their opinion, on the merits of the question presented, judgment should have been for the defendants. The only reason given for not entering such judgment was the precedent of *Stone's Express, Inc.* v. *United States,* supra.

We submit that the *Stone's Express Case* decision is not a proper basis for application of the doctrine of *stare decisis.*

The rule of *stare decisis* has as its objective the establishment of precision and certainty in the law. Essentially it is a doctrine of estoppel applied to court

decisions. When a judicial principle or statutory interpretation has been announced and rights of individuals have been settled, or contracts made, on the basis thereof, public policy requires the preservation of, and continued adherence to, such principle or interpretation, except for the most cogent reasons warranting a departure therefrom. *McGruder* v. *Bank of Washington*, 9 Wheat (U.S.) 598, 6 L. ed. 170; *Gilman* v. *Philadelphia*, 3 Wall. (U.S.) 713, 18 L. ed. 96; 14 *American Jurisprudence*, pp. 284-285; 21 *Corpus Juris Secundum*, pp. 302-304.

The issue which the District Court was considering in the *Stone's Express Case* was one of first impression. It was truly a matter *res integra*. The court concluded that section 9(b) of the Administrative Procedure Act did not apply to temporary authorities granted under section 210a(b) of the Interstate Commerce Act. An appeal was taken to this court and probable jurisdiction was noted (348 U.S. 885, 99 L. ed. 969). Thereafter, because of final action by the Commission on the application for permanent authority prior to consideration of the case by this Court, and upon a stipulation of mootness by the parties, this Court remanded the case to the District Court with instructions to dismiss the action for mootness. (350 U.S. 906, 100 L. ed. 125). The District Court accordingly vacated its judgment.

Thus, the *Stone's Express Case* has never adjudicated rights between any persons, nor has there been any reliance by the Commission on the *Stone's Express Case* decision. It has subsequently permitted water carriers and motor carriers to continue operating under expired temporary licenses, while their permanent authority applications are pending, in the firm

belief that despite that decision section 9(b) of the Administrative Procedure Act has continued the effectiveness of those licenses.

The reasons for applying the rule of *stare decisis* do not exist, therefore, in this case. The *Stone's Express Case* decision has not established a statutory construction upon which persons have relied and which, therefore, should operate as an estoppel. This case is the only other case in which this issue has been presented to a court, and in view of the status of the decision in the *Stone's Express Case,* the matter in question is, in fact, *res integra* in this case.

The District Court in this case was presented with valid arguments which were not before it in the *Stone's Express Case;* on the basis of such facts and arguments, the majority of the District Court in this case has concluded that the decision reached in the earlier case was erroneous. The proper administration of justice would appear to require that the District Court in this proceeding enter a judgment consistent with its conclusions on the merits of the case, since the District Court is not, in fact, constrained by the reasons and purposes underlying the doctrine of *stare decisis* to follow the *Stone's Express Case.*

CONCLUSION

The harmonious construction of section 9(b) and section 311(a) urged by appellants is consistent with the Congressional objective sought to be accomplished, the protection to license holders against interrruptions in operations resulting from delays in agency procedures. The cost to a shipping company of initiating

a new service is considerable, involving, as it does, moving ships in non-revenue service to new ports of loading, establishing administrative and sales organizations, securing port facilities, and meeting various regulatory requirements—all in advance of initiating revenue producing activities and requiring several weeks to complete. In face of a fixed 180-day limitation in temporary authorities and the knowledge that Commission procedures in connection with permanent applications require 12 months or more, few operators would be willing to initiate continuing services even to meet emergency needs. If one did so, and were required temporarily to discontinue it at the termination of the 180-day period, the same types of expenses would be incurred both in discontinuing the service and in beginning it again. The injury to the operator, Pan-Atlantic in this case, if forced to discontinue service temporarily, would indeed be irreparable and severe. The rule of decision enunciated in this case, having logical application to extended licenses originally issued pursuant to section 210a(a), 210a(b), and 310(b), will have considerable economic effect in the transportation industry.

The statutory construction, which appellant has expressed herein, provides a logically sound basis for preserving to these operators the protection intended by Congress to have been afforded them by section 9(b), without doing violence to the language of section 311(a). It should be adopted by this Court.

Wherefore, the appellant, Pan-Atlantic Steamship Corporation, respectfully prays that this Court reverse the judgment of the District Court and remand this

case to the District Court with instructions to enter judgment for the appellant.

Respectfully submitted,

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February 22, 1957

Proof of Service

I, David G. Macdonald, one of the attorneys for Pan-Atlantic Steamship Corporation, appellant herein, and a member of the bar of the Supreme Court of the United States hereby certify that on the 22nd day of February, 1957, I served copies of the foregoing document on the counsel for the several parties to this proceeding, by mailing a copy in a duly addressed envelope, by first-class mail, postage prepaid, to each of the following:

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